Massachusetts Laborers' District Council *and* A. Amorello & Sons, Inc. Case 1–CD–936

June 22, 1994

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS DEVANEY, BROWNING, AND COHEN

The charge in this Section 10(k) proceeding was filed November 2, 1993, by A. Amorello & Sons, Inc. (the Employer), alleging that the Respondent, Massachusetts Laborers' District Council (the Laborers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by the International Brotherhood of Teamsters, Local 170, AFL–CIO (the Teamsters). The hearing was held December 21, 1993, before Hearing Officer Thomas J. Morrison. The Employer filed a posthearing brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record,[1] the Board makes the following findings.

I. JURISDICTION

The Employer is engaged in heavy and highway construction involving paving, excavating, and installing and repairing sewer systems. Annually the Employer purchases and receives goods valued in excess of $50,000 directly from suppliers located outside the Commonwealth of Massachusetts. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Laborers and Teamsters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer operates a seasonal construction business in the Worcester, Massachusetts area. It has had a collective-bargaining relationship with the Laborers since approximately 1946 and with the Teamsters from about 1967.

Historically the Employer has owned a fleet of six-wheel trucks, including water trucks, that it uses on construction projects. The Employer has also owned 10-wheel vehicles, including dump trucks, trailers, and a low-bed truck. According to the Employer, employees represented by the Teamsters traditionally have driven its 10-wheel trucks but Laborers-represented employees have driven its water trucks and other six-wheel vehicles. The dispute in this case centers exclusively around assignment of the work of driving water trucks.

In December 1992, the Employer wrote the Teamsters stating that, for financial reasons, it was discontinuing its trucking operations effective January 1, 1993. Because of this decision no Teamsters-represented employees were recalled from layoff for the 1993 season. Instead, the Employer filled its needs for driving 10-wheel vehicles by leasing trucks driven by employees of a leasing company.

The Employer owns two types of water trucks. One truck is a 2000-gallon fuel truck that the Employer has converted for use with water. The Employer also uses smaller ''water wagons'' consisting of water tanks towed by six-wheel tool trucks. The water truck and water wagons, which are infrequently used, are used to control dust on jobsites, to protect equipment from overheating, and to wet down paving rollers.

Because the large water truck is not registered, the Employer moves it from site to site on a low-bed truck. Previously, an employee represented by the Teamsters drove the low-bed truck that transported the water truck. Since 1993, the Employer has rented a low-bed truck and driver to transport its water truck to jobsites.

Once on a jobsite, employees represented by the Laborers historically have operated the water truck and water wagons. The Laborers-represented employee who is assigned the water truck fills the water tank, disperses the water, and moves the truck as needed on the site. On average, the water truck is repositioned by the laborer about three times each day, and each move takes a few minutes. When the water truck is idle, the laborer performs laboring work.

In the summer of 1993,[2] the Employer used its water truck on the I-190 highway construction job in the Worcester area. On July 27, the Teamsters filed a grievance alleging that water truck work traditionally belonged to it, that the five employees it represented were on layoff, and that the Employer improperly used another employee for the water truck work. On August 9, counsel for the Employer wrote the Teamsters denying this grievance and stating that the Employer would not arbitrate the work dispute. On August 10, the Teamsters wrote the Employer's attorney stating that its contract, the Massachusetts Heavy Construction Agreement, explicitly covered, among other things, water and fuel trucks.

[1] At the hearing, the Employer made a motion that the Board take administrative notice of the transcript, exhibits, and briefs in Case 1–CD–925, involving a dispute between the Unions over driving the Employer's six-wheel trucks. We grant this unopposed motion.

[2] All subsequent dates are in 1993 unless noted.

On October 5 or 6, Laborers' regional director, Paul McNally, telephoned the Employer saying he had heard of the Teamsters' grievance. McNally stated that the water truck work belonged to the Laborers, and that it always had. McNally additionally stated that he would strike the Employer if it awarded the work to the Teamsters.

B. *Work in Dispute*

The disputed work involves operation of the Employer's water trucks on the Employer's construction projects in central Massachusetts.

C. *Contentions of the Parties*

1. The Employer

The Employer contends that the disputed work should be assigned to employees represented by the Laborers. The Employer maintains that for 47 years, its undisputed, uniform practice has been for laborers to drive its water truck and wagons. The Employer contends that, until now, the Teamsters has never protested this work assignment. The Employer also argues that it is more efficient and economical for Laborers-represented employees to load, move, and spray water because this work is an integral aspect of laboring. Additionally, submits the Employer, because it takes only a few minutes to move the water trucks, it would be inefficient to assign this work to employees represented by the Teamsters.

The Employer further argues that if it were required to assign the water truck work to Teamsters-represented employees it would have to lay off experienced laborers from its construction crew. This, the Employer submits, would result in a separate crew of Teamsters-represented truckdrivers who would sit idle in water trucks while laborers performed jobsite construction work.

Finally, the Employer contends that assignment of the water truck work is consistent with the parties' collective-bargaining agreements. Although the Employer concedes that the Teamsters' contract explicitly covers water trucks, it argues that, from 1967 until now, the Teamsters has never claimed that employees it represents were entitled to operate its water trucks.

2. The Laborers

The Laborers did not submit a brief in this case or make a statement of position at the hearing. The Laborers, however, has claimed the water truck work, asserting that it traditionally has been assigned to employees it represents. Through questioning by its counsel at the hearing, the Laborers also sought to prove that the Teamsters has never before contractually claimed the water truck work, nor sought to resolve the jurisdictional dispute under a purported 1947 agreement between the Laborers and the Teamsters.[3]

3. The Teamsters

The Teamsters did not file a brief or make a formal statement of position. The Teamsters' representative did assert at the hearing, however, that the Teamsters' contract explicitly covered water truck work and that the Laborers' agreement did not. In addition, a witness for the Teamsters testified that the Teamsters recently negotiated an agreement with another area employer, Barton Trimont, which formalized that employer's practice of assigning water truck work to Teamsters-represented employees. This witness further testified that the Teamsters and Laborers have a longstanding agreement to resolve jurisdictional disputes without submitting them to Section 10(k) proceedings. Finally, the Teamsters argued in this case, as well as in Case 1–CD–925, that it would not be a hardship for the Employer to reassign water truck work to employees it represents. Unlike some other operations where Teamsters' drivers do not get out of their trucks, the Teamsters asserts that the 10-wheel drivers frequently perform laborer work when they are not driving. The Teamsters Union also asserts that, to its knowledge, Laborers has never complained about Teamsters-represented drivers performing laborers' work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute under Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) that the parties have not agreed on a method for the voluntary adjustment of the dispute.

Initially, we find that there are competing claims for the water truck work. The Teamsters demanded this work in a July 27 grievance against the Employer and in its August 10 followup letter. The Laborers similarly claimed the work in its October 5 or 6 telephone call to the Employer.

There is also reasonable cause to believe that Section 8(b)(4)(D) has been violated. The Laborers threatened to strike the Employer if it awarded the work to

[3] We have taken notice, supra, of the record in Case 1–CD–925 which involved six-wheel trucks other than the water trucks. There the Laborers additionally argued that: (1) the Laborers' agreement covered small trucks, but the Teamsters' contract generally covered larger vehicles; (2) there was no voluntary mechanism to resolve the dispute between the parties; (3) the Employer's past practice clearly favored assignment of the disputed work to employees it represented; (4) area practice favors an award of work to Laborers-represented employees; and (5) it would be much more costly and inefficient to assign the disputed work to Teamsters-represented employees.

the Teamsters-represented employees. See generally *Laborers (RMC Lonestar)*, 309 NLRB 412 (1992).

Finally, no agreed-on method exists for voluntarily adjusting the dispute. Although the Teamsters and Laborers entered into an agreement in 1947, which they reaffirmed in 1991, providing that they would resolve jurisdictional disputes without recourse to the National Labor Relations Board, the Employer was not party to this agreement. Second, although article 2, item 5, of the Teamsters' contract with the Employer contains a mechanism for resolving jurisdictional disputes, this provision applies only to disputes between Teamsters locals. Finally, the Employer has made clear that it would not arbitrate any dispute over assignment of the water truck work.

On these bases, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

There is no evidence that either Union has been certified to represent employees performing the disputed work. Both parties assert, however, that their respective collective-bargaining agreements entitle them to the water truck work.

The Laborers has had a collective-bargaining relationship and successive agreements with the Employer for almost 50 years. The current contract, effective from June 1, 1991, through May 31, 1994, provides at article VIII, section 2, that heavy highway construction work includes the ''operation of all on-site pick-up and service trucks.''[4]

The Employer has had a bargaining relationship with the Teamsters since about 1967. The 1993–1996 Massachusetts Heavy Construction Agreement, to which the Employer and Teamsters Local 170 are bound, covers ''tank trucks used for transporting any type of . . . water,'' as well as the ''transportation of all building and excavating materials and equipment including . . . water.'' Identical provisions were included in the 1990–1993 Massachusetts Heavy Construction Agreement.

The 1991–1994 contract binding the Employer and the Laborers arguably encompasses the disputed work. Similarly, the 1990–1993 and 1993–1996 Teamsters' agreements also purport to cover the disputed work. Accordingly, this factor favors neither group of employees.

2. Employer preference

The Employer prefers to use employees represented by the Laborers, rather than Teamsters-represented employees, to drive and operate its water trucks. Therefore, this factor favors the award of the disputed work to employees represented by the Laborers.

3. Employer past practice

For the approximately 47 years that the Employer has been signatory to agreements with the Laborers, it has assigned to employees represented by this Union the work of driving and operating its water trucks. Other than placing the water truck on a low-bed truck and delivering it to the jobsite, the Teamsters Union does not claim that employees it represents have ever performed water truck work. Thus, the factor of employer practice favors the award of the disputed work to employees represented by the Laborers.

4. Area practice

The Employer states that it does not know who drives its competitors' water trucks. The Teamsters Union asserts that another area contractor, Barton Trimont, assigns water truck work to its Teamsters-represented employees, and has formalized this practice in its current contract with the Teamsters. Based on the evidence presented, we find that the factor of area practice is inconclusive.

5. Economy and efficiency of operations and job impact

The Employer argues that it is more efficient to assign the disputed work to employees represented by the Laborers. The Employer asserts that water truck work typically takes only minutes a day. During the remainder of the workday, the Employer contends that the laborer assigned to the water truck performs regular laboring work. Conversely, the Employer contends that because it no longer employs any Teamsters-represented employees, it would be inefficient to use them for water truck work. Thus, the Employer argues that it would have to lay off one of its experienced and

[4] This agreement is between the Labor Relations Division of Construction Industries of Massachusetts, Inc., of which the Employer is a member, and the Massachusetts Laborers' District Council of the Laborers' International Union.

skilled laborers and hire a Teamsters-represented employee for a few minutes' work, because the Laborers would not allow Teamsters-represented employees to perform laboring work.

The Teamsters, in this case and in Case 1–CD–925, claims that employees it represents have performed considerable laboring work for the Employer. The Teamsters asserts that when employees it represents were not driving 10-wheel vehicles, they drove the Employers' other vehicles and performed laboring duties.

Under these circumstances, we do not rely on these factors in determining the assignment of the disputed work.

6. Relative skills

The Employer contends that it was ''satisfied with the relative skills of employees represented by the Laborers in operating the water trucks'' and that, therefore, this factor favors the award of the work to employees the Laborers represents. The record, however, contains no evidence as to whether special skills or licenses are required to operate the Employer's water trucks. Accordingly, this factor is inconclusive.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Laborers are entitled to perform the disputed work. We reach this conclusion by relying on the factors of employer preference and past practice. In making this determination we are awarding the work to employees represented by the Laborers, not to that Union or its members.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of A. Amorello & Sons, Inc., represented by Massachusetts Laborers' District Council are entitled to perform the work of driving and operating water trucks for A. Amorello & Sons, Inc. on the Employer's construction sites in central Massachusetts.